

MEMORANDUM OF LAW

DATE: April 10, 1992

TO: Mayor Maureen O'Connor

FROM: City Attorney

SUBJECT: Enforcement Issues in Campaign Fairness Ordinance of 1973

Your memorandum of March 3, 1992, addressed to City Attorney John W. Witt containing questions about the City's former Campaign Fairness Ordinance has been referred to me for response.

Your questions were apparently brought to mind by two prior City Attorney reports dated March 19, 1974, and January 3, 1990, and their attachments. Both of those reports and their attachments are hereto attached for your convenient reference. I draw your attention to the attachment to the 1974 report, namely, a nine page memorandum from then Deputy City Attorney Dennis S. Avery to City Attorney John W. Witt and then Chief (now Senior Chief) Deputy City Attorney Stuart H. Swett regarding the Campaign Fairness Ordinance (hereafter "Avery memorandum"), because it is critical to understanding and resolving the questions presented in your recent memorandum.

In your recent memorandum you cite and ask questions specifically about former San Diego Municipal Code ("SDMC") section 27.3003, which was part of the City's original Campaign Fairness Ordinance adopted by the Council in 1973. As originally adopted, Section 27.3003 read as follows:

SEC. 27.3003 IDENTIFICATION OF CAMPAIGN MATERIAL

No person shall write or cause to be written, printed, posted or distributed any campaign material unless there appears on the campaign material, in a conspicuous place, the name and address of the printer and either:

(a) The name and address of the chairman and secretary or the names and addresses of at least two officers of the political or other organization issuing it;
or

(b) The name and residence address, with the street and number, if any, of some person who is responsible for it.

As you correctly note, this section along with other sections of the Campaign Fairness Ordinance were repealed by the City Council on April 23, 1979. Prior to its repeal, and as you also note in your memorandum, the City Attorney had reported severe enforcement problems with the prior Campaign Fairness Ordinance, including Section 27.3003.

QUESTIONS PRESENTED

You ask the City Attorney how to avoid the enforcement problems posed by this former SDMC section 27.3003. Presumably you want to know in the event the Council wishes to adopt the same or a substantially similar ordinance in the future. Implicit in your question is a request for the City Attorney to identify the enforcement problems posed by the former section. This memorandum will address both questions.

HISTORICAL BACKGROUND

To answer your questions, it will be useful to place SDMC section 27.3003 in its historical context. According to the Avery memorandum, former SDMC section 27.3003 was designed specifically to complement then existing California Elections section 12047, which was adopted in 1961. As originally adopted, Section 12047 read as follows:

12047. Every person is guilty of a misdemeanor who writes or causes to be written, printed, posted, or distributed any circular, pamphlet, letter, or poster which is designed to injure or defeat any candidate for nomination or election to any public office by reflecting upon his personal character or political action, unless there appears upon the circular, pamphlet, letter, or poster, in a conspicuous place, the name and address of the printer and either:

- (a) The name and address of the chairman and secretary or the names and addresses of at least two officers of the political or other organization issuing it;
- or
- (b) The name and residence address, with the street and number, if any, of some voter of this State, who is responsible for it.

1976 Stats. ch. 23, Sec. 5, 423.

It appears that essentially the same legislation was enacted by a vote of the people of California in a slightly different form as part of the Political Reform Act of 1974. (Codified at Government Code section 81000 et seq.) The specific section that appears to parallel former California Elections Code 12047 reads as follows:

Section 84305. Requirements for Mass Mailing.

(a) Except as provided in subdivision (b), no candidate or committee shall send a mass mailing unless the name, street address, and city of the candidate or committee are shown on the outside of each piece of mail in the mass mailing and on at least one of the inserts included within each piece of mail of the mailing in no less than 6-point type which shall be in a color or print which contrasts with the background so as to be easily legible. A post office box may be stated in lieu of a street address if the organization's address is a matter of public record with the Secretary of State.

(b) If the sender of the mass mailing is a single candidate or committee, the name, street address, and city of the candidate or committee need only be shown on the outside of each piece of mail.

(c) If the sender of a mass mailing is a controlled committee, the name of the person controlling the committee shall be included in addition to the information required by subdivision (a).

Government Code section 84305, as amended by 1989 Stats. ch. 764.

Although phrased somewhat differently, Government Code section 84305 accomplishes the same purpose as the former Elections Code section 12047, namely, to require that the name and address of persons responsible for distributing written materials in political campaigns be clearly identified on the written material.

I also note that in recommending repeal of the City's former Campaign Fairness Ordinance, the City Clerk especially noted that SDMC section 27.3003 was rendered unnecessary and obsolete in part by Government Code section 84305. At the same time, the Clerk also noted that SDMC section 27.3003 requiring that all campaign material include the name and address of campaign officials made "it very difficult to produce buttons, pins, pencils, and other similar material in accordance with the law." ¶Source: City Clerk's files pertaining to Ordinance No. O-12630, Request for Council Action (1472) dated February 22, 1979.σ

Enforcement Problems Identified

Although the Avery memorandum dealt with more than merely enforcement problems associated with the City's former Campaign Fairness Ordinance, the memorandum focuses on enforcement issues at pages 4 and 5. The enforcement issues as they relate to former SDMC section 27.3003

are inextricably linked with other then existing sections of the Campaign Fairness Ordinance. Briefly, the enforcement issues identified in the Avery memorandum are as follows:

1. To the extent that campaign materials were required by the former ordinance to be filed with the City Clerk, they become public records and all members of the public had access to them. Unless access to these files was controlled or duplicate files maintained, the evidentiary "chain of custody" necessary to prove a case could have easily been broken, thereby preventing enforcement.
2. Enforcement of this type of detailed ordinance necessitates coordinated investigations and evidence gathering by experienced investigators during the campaign itself, including gathering of documents and witnesses.

As the Avery memorandum points out, absent evidence gathered at the time of violation, enforcement is seriously weakened.

"Serious effort to enforce the ordinance will require sufficient funds for investigators, otherwise prospects of viable enforcement are wishful. The ordinance provides criminal sanction; a criminal case demands proof beyond any reasonable doubt; which in turn demands evidence certain to prove violations."
(Avery memorandum at p. 5.)

3. In general, as the Avery memorandum dramatically pointed out, the former Campaign Fairness Ordinance was a "guillotine with a hard trigger" since it required forfeiture of candidacy or office for even the most minor violations of the ordinance.
(Avery memorandum at p. 3.) It was a law that "decapitated public office for even the slightest digression."
(Avery memorandum at p. 4.)

Given the severe consequences of a violation of the ordinance, a court would

likely require the prosecutor to have an almost air-tight case.

Avoiding Similar Enforcement Problems

Assuming the Council were to adopt an ordinance similar to former SDMC section 27.3003, the question presented is whether and how similar enforcement problems can be avoided.

The answer depends in part on the nature of the enforcement problem.

First, a new ordinance would not have to require prior registration or filing of campaign documents with the City Clerk, thereby avoiding the "chain of custody" evidentiary problems in the prior ordinance.F

I also note that a "prior registration" requirement would raise other issues under the First Amendment, because the requirement may create an unlawful "prior restraint" of protected speech. If the Council desires to readopt a prior registration requirement, both the enforcement and constitutional issues would have to be examined carefully.

Second, a new ordinance will still require experienced investigators to gather evidence of violations. This problem cannot be avoided.

Last, a new ordinance could be drafted to avoid the draconian consequences caused by violations of the former ordinance - i.e., minor violations do not necessarily have to result in forfeiture of candidacy or office.

In closing, I especially take note that current Government Code section 84305 requiring identification on "mass mailings" (defined as 200 or more similar documents) is regularly and vigorously enforced by the state's Fair Political Practices Commission. If the Council were to adopt new local legislation requiring identification on campaign literature, I recommend that the Council determine whether the local law is necessary in light of existing state law and its enforcement.

JOHN W. WITT, City Attorney

By

Cristie C. McGuire

Deputy City Attorney

CCM:jrl:011(x043.2)

Attachments

ML-92-33